

c. 11/2/84



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Federal Auction Service Corporation; Larry  
Latham Auctioneers, Inc.; Kaufman Lasman  
**File:** Associates, Inc.  
B-229917.4, B-229917.5, B-229917.7  
**Date:** June 10, 1988

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### DIGEST

1. Where contracting agency properly decides to open negotiations and, if appropriate, terminate award improperly made on the basis of initial proposals, contracting agency is not required to release to each offeror information regarding agency's evaluation of initial proposals even though one offeror in fact received such information, since the information was released after initial award was made but before the decision to open negotiations, in accordance with the Federal Acquisition Regulation regarding debriefings and the Freedom of Information Act.
2. Protester's contention that letter requesting best and final offers (BAFOs) improperly restricted scope of revisions it could make to its proposal is without merit since, unless expressly instructed otherwise, offerors are on notice that changes to their technical proposals are permitted in BAFOs.
3. Protester's contention that contracting agency should more clearly define evaluation subfactors is without merit since agency need not specifically identify subfactors so long as they are reasonably related to evaluation factors set out in solicitation.
4. Protester's contention that another offeror should be deprived of profits it received for interim performance of services at issue in protest does not involve an issue subject to review by General Accounting Office under the Competition in Contracting Act; further allegation that profits improperly subsidized offeror's current best and final offer (BAFO) provides no basis to require that contracting agency exclude BAFO from consideration for award.

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## DECISION

Federal Auction Service Corporation and Larry Latham Auctioneers, Inc. protest the decision by the Veterans Administration (VA) to open negotiations under request for proposals (RFP) No. 26/101/2 for auctioneering services in connection with sales of single family properties owned by VA. Another offeror, Kaufman Lasman Associates, Inc., challenges VA's decision to allow Latham to conduct a number of auctions for VA while the protests are pending. We deny the protests by Latham and Federal and dismiss Kaufman's protest.

VA originally made award under the RFP to Latham based on initial proposals. VA later determined that the award was improper under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (Supp. III 1985), which authorizes award on the basis of initial proposals only where it is clear that award will result in the lowest overall cost to the government. In our decision on a prior protest by Latham challenging VA's decision to open negotiations, we agreed with VA that the award to Latham was improper since under the fee structure in the RFP it was not possible to determine from initial proposals which offeror was the lowest priced. Accordingly, we upheld VA's decision to hold discussions and request best and final offers (BAFOs) from all offerors in the competitive range and, if appropriate, terminate the contract awarded to Latham. Kaufman Lasman Associates, Inc., et al., B-229917, et al., Feb. 26, 1988, 88-1 CPD ¶ 202, aff'd on reconsideration, B-229917.3, Mar. 16, 1988, 88-1 CPD ¶ 271.

After VA made award to Latham but before it decided to open negotiations, VA held an oral debriefing for Kaufman, an unsuccessful offeror under the RFP. VA also provided Kaufman with the evaluators' written comments on its proposal in response to a request filed by Kaufman under the Freedom of Information Act (FOIA). While conceding that it also received an oral debriefing, Latham now maintains that VA is required to provide it with the written evaluations of its proposal equivalent to those provided to Kaufman under its FOIA request. Similarly, Federal, another unsuccessful offeror which did not receive a debriefing or written comments, argues that it is entitled to receive information regarding VA's evaluation of its proposal in the same detail as VA provided to Kaufman. Both protesters contend that unless VA provides such information, Kaufman will enjoy an unfair competitive advantage in the procurement.

A contracting agency is not required to equalize a competitive advantage enjoyed by an offeror unless that

advantage results from preferential treatment or other unfair action by the government. Diagnostic Equipment Services, B-228050.2, Dec. 3, 1987, 87-2 CPD ¶ 541. Here, VA held a debriefing for Kaufman, an unsuccessful offeror, after award was made, in accordance with Federal Acquisition Regulation (FAR) § 15.1003, and released the evaluators' written comments to Kaufman under FOIA.<sup>1/</sup> In doing so, VA was merely carrying out the requirements of the FAR and FOIA. The fact that later events--specifically, the need to remedy the statutory violation involved in allowing award to Latham to stand--required reopening proceedings under the procurement does not mean that VA now must compensate for any advantage Kaufman may have derived from the debriefing and disclosure of documents under FOIA, both of which were proper at the time VA provided them to Kaufman.

Latham also argues that VA's letter requesting BAFOs improperly limited the scope of revisions Latham could make in its BAFO. Latham relies on the following language in the letter:

"If you choose to participate, please submit any information which you feel will answer the following concerns of the Technical Evaluation Board, along with your best and final price. . . ."

Latham's argument is clearly without merit since, absent express instructions to the contrary, which VA's letter does not contain, offerors are on notice that changes to their technical proposals are permitted in BAFOs. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121.

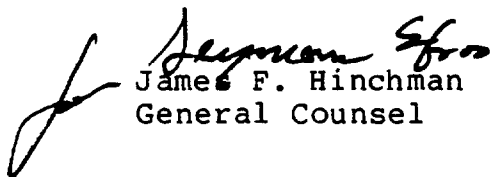
In its protest, Federal states that in evaluating the initial proposals, VA relied on three technical evaluation subfactors--number of full-time employees, number and location of company offices, and representative closing rates--which should be more clearly defined. We disagree. A contracting agency need not specifically identify the evaluation subfactors it uses if they are reasonably related to the evaluation criteria set out in the solicitation. Washington Occupational Health Associates, Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567. It is clear in our view that the subfactors Federal states that VA used are reasonably related to the technical evaluation criteria set out in the RFP, marketing approach and organizational ability. In fact, Federal does not argue to the contrary.

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<sup>1/</sup> Apparently neither Latham nor Federal has filed a FOIA request for the information they seek from VA.

Finally, Kaufman's protest concerns VA's decision to allow Latham to conduct a number of auctions while the protests by Latham and Federal are pending. Kaufman contends that VA should exclude Latham's BAFO from further consideration for award under the RFP because Latham has received "illegal super profits" from its interim performance, which Latham may use to improperly "subsidize" its BAFO price. Kaufman also maintains that VA should take steps to "deny" Latham its allegedly illegal profits. Kaufman does not show any basis for characterizing the amounts paid Latham as "illegal super profits." While Kaufman argues that the pricing scheme under which Latham is conducting the auctions is materially unbalanced, there is no indication that the total paid to date is unreasonably high. In any event, to the extent that Kaufman requests that our Office direct VA to recover from Kaufman some of the amount paid, Kaufman's request is outside the scope of our review under CICA. Further, we fail to see any basis on which the issue Kaufman raises--the effect of Kaufman's profits on preparation of its BAFO--would require VA to exclude Kaufman's BAFO from consideration, as Kaufman requests. Accordingly, we dismiss Kaufman's protest.

The protests by Latham and Federal are denied; the protest by Kaufman is dismissed.

  
James F. Hinchman  
General Counsel